Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-251

WILLIAM WRIGHT,
Petitioner,

vs.

PEOPLE OF THE STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Respondent, State of Indiana, respectfully prays this Court to deny issuance of a writ of certiorari to the Indiana Supreme Court, thereby refusing to review the decision entered by that Court in cause number 876 S 279 on February 10, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana appears at 372 N.E.2d 453 and is appended to the Petition for Writ of Certiorari. The Supreme Court of Indiana denied Petitioner's Petition for Rehearing on May 15, 1978 and the Order denying said Petition is appended to the Petition for Writ of Certiorari as Appendix C.

QUESTION PRESENTED FOR REVIEW

The Respondent would assert that the issue presented as this time is whether the Supreme Court of Indiana committed error by reversing the trial court's order granting Petitioner a new trial on grounds of prosecutorial nondisclosure of exculpatory evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

I. Course of Proceedings Below

Petitioner, William Wright (hereinafter referred to as defendant) was found guilty of armed robbery and kidnapping after a jury trial. Defendant appealed directly to the Supreme Court of Indiana which affirmed the conviction on August 8, 1972 in *Wright v. State,* 259 Ind. 197, 285 N.E.2d 650 (1972).

In Post Conviction Relief proceedings the trial court granted defendant a new trial on the bases that an alleged showing of defendant's prior criminal record to a witness prior to positive identification, as well as nondisclosure of the fact that previously the witness was unsure of the

identification, constituted exculpatory evidence which the State failed to properly disclose in contravention of *Brady v. Maryland,* 373 U.S. 83 (1963).

On appeal by the State, the Supreme Court of Indiana reversed the trial court's order, thereby reinstating defendant's conviction. The Supreme Court decided that the trial court had erroneously assumed full applicability of *Brady, supra,* and that the evidence claimed omitted was in the nature of speculation rather than exculpatory. From that decision, Petitioner seeks a Writ of Certiorari.

II. Facts Relevant to Issues Presented for Review

In February of 1969, James Woodsmall was robbed and kidnapped by two men. They forced him to sit between them in the front seat of his car while they effected their escape. Woodsmall managed to attract the attention of a policeman, and a high speed chase ensued. The two robbers abandoned the car in an apartment complex parking lot, and defendant was apprehended in the vicinity about a half hour later. Woodsmall was taken to view defendant, but could not make a positive identification at that time. At the original trial, Woodsmall explained why he hesitated to make an accusation immediately after the incident:

> "I was very much upset, very nervous and I didn't—I didn't want to make a mistake. I certainly didn't want to identify an innocent man but I looked him over very carefully and within an hour I was sure it was him."
> (Trial Record, p. 139.)

Petitioner contends that Woodsmall also failed to identify defendant at a preliminary hearing the next day, and that the witness was shown a copy of defendant's criminal record prior to positive identification. At the post-conviction relief hearing, however, Detective Parnell of the

Indianapolis Police Department testified that the hearing in question was held on February 27, 1969, six days after the robbery and kidnapping. He stated that Woodsmall made a positive identification of defendant at that hearing. The witness was shown about ten pictures of people having the same general appearance, including one photograph of defendant. Woodsmall may have seen defendant's prior criminal record at this time, but Detective Parnell could not definitely say whether the record was shown or not.

Woodsmall had suffered a stroke and was unable to testify at the post conviction relief hearing. He testified at the original trial that he was positive about his identification:

> Q: Now, Mr. Woodsmall, you do realize that the defendant is charged with two serious crimes, do you not?
>
> A: Yes.
>
> Q: Knowing this then, is there any question or any doubt in your mind that the defendant, William Wright, is one of the men that committed this crime against you?
>
> A: No.
>
> Q: No what?
>
> A: No doubt in mind, I have no doubt.
>
> (Trial Record, p. 317.)

Woodsmall also testified that his in-court indentification of the defendant was the result of seeing the defendant during the ride in the car.

Along with this testimony, the jury also heard all the evidence relating to Woodsmall's inability to identify defendant at the scene of the crime.

REASON FOR DISALLOWANCE OF THE WRIT

The Petitioner's contentions of error which form the basis for the application for this writ are without merit. A review of the evidence, together with basic concepts of Indiana law viewed within the mandates of Federal Constitutional law, reveals that there are inadequate grounds for a finding of reversible error.

I.

The Defense Counsel and the Jury Had Access to the Allegedly Omitted Evidence

Petitioner implies that the State did not disclose certain exculpatory evidence regarding the victim's initial lack of identification of the defendant. The testimony of Detective Parnell indicates no evidence was withheld and the State's entire file was offered to the Petitioner's defense counsel. The Indiana Supreme Court found that there was no claim of actual suppression of any evidence, and that the defense was free at any time before or during the original action to question the police and the victim as to the details of the identification procedure. *State v. Wright,* 372 N.E.2d 453, (1978). It is not the duty of the prosecution to bear the burden of assembling the defense counsel's evidence. *Ortez v. State,* —Ind.App.—, 333 N.E.2d 838 (1975). The Petitioner seeks to show that the nondisclosure was analogous to the landmark case of *Brady v. Maryland,* 373 U.S. 83 (1963), which involved a situation where the prosecution suppressed exculpatory evidence after a specific request by defense counsel.

In *Edwards v. State of Oklahoma,* 429 F.Supp. 668, 671 (W.D.Okla. 1976) the *Brady* rule was discussed:

> To establish a violation of the *Brady* rule the accused must show: (1) Evidence which is favorable to him; (2) Such evidence was in the possession of

> the prosecution at some time; (3) The evidence was suppressed and not made available to the petitioner on his request therefor; and (4) The evidence was material either to the issue of petitioner's guilt or punishment.

In the present case, there was no specific request, nor was there a withholding of evidence. Therefore, the *Brady* rule does not apply. The files were open to the inspection of defendant's counsel at any stage. The prosecution has no constitutional duty to routinely deliver his entire file to defense counsel. *United States v. Agurs*, 427 U.S. 97 (1976). *Moore v. Illinois*, 408 U.S. 786 (1972).

Furthermore, Petitioner has failed to mention that testimony was adduced at the jury trial in which the victim admitted he was unable to identify defendant at the scene of the crime. Detective James Parnell testified at the post-conviction relief hearing about evidence raised at the jury trial:

> Q: And this was—the jury heard all this evidence, didn't they?
>
> A: Yes, sir.
>
> Q: About the confusion and identification et cetera, et cetera, didn't they?
>
> A: Yes, sir.

(Trial Record, p. 422.)

There was no suppression of evidence by the prosecution, and the jury did hear evidence that the victim was initially unable to identify the victim. There are no grounds at this stage of the proceedings for Petitioner to claim unconstitutional nondisclosure of evidence.

II.

The Allegedly Undisclosed Evidence Was Not Sufficient To Create a Reasonable Doubt of Guilt

In *United States v. Washington*, 550 F.2d 320 (5th Cir. 1977) the Court summarized the decision of *Agurs, supra:*

> "The Court in Agurs held that, 'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.' 96 S.Ct. at 2400. It was recognized that the courts 'cannot consistently treat every nondisclosure as though it were error'. The Court continued: 'It necessarily follows that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless error standard.' Id. at 2401.
>
> In discussing the 'standard of materiality' which gives rise to a duty on the part of a prosecutor 'to volunteer exculpatory matter to the defense', the Court said:
>
> > 'It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. . . .' " Id. at 2401.

The allegedly undisclosed evidence in the present case is insufficient to form a reasonable doubt necessary to establish materiality in the constitutional sense. The victim, by his own admission, was "scared to death" after the robbery and kidnapping. He was reluctant to make a

positive identification while he was in this state of mind because he didn't want to make a false accusation. This cautious attitude shows that the witness was being extremely conscientious in identifying his kidnappers. After he had "simmered down" he was positive that defendant was one of the perpetrators of the crime. He testified twice at the trial that he was sure shortly after he had left the scene that defendant was one of the kidnappers. His strong and unequivocal identification testimony, coupled with the fact that he was within a few inches of defendant's face for a full five minutes, was sufficient evidence upon which to base a conviction. The fact that he was unable to make such an identification when he was still in a state of shock fails to establish a "reasonable doubt of guilt."

A similar situation arose in the case of *United States v. DeLeo*, 422 F.2d 487 (1st Cir. 1970), *cert. denied* 397 U.S. 1037, (1970) in which a bank teller expressed initial confusion about a robber's identification. The Court found that her detailed and accurate description of the defendant, and her positive identification in an uncontested display of photos after the robbery dispelled any concern with her initial confusion. This case is analogous to the victim's early confusion and his subsequent photographic and in-court identifications which are sufficient to sustain defendant's conviction.

Petitioner has failed to establish a "reasonable doubt of guilt" necessary to prove a constitutional error of non-disclosure.

III.

There Was No Undue Suggestion in the Pre-Trial Identification Procedures

Petitioner obtusely refers to the possibility of an unduly suggestive photo display prior to trial. This allegation is without merit. The victim was shown ten photographs of persons with the same general physical characteristics as the defendant. He was able to distinguish defendant from the other subjects. There is no uncontested evidence that the victim saw defendant's criminal record at this time. Assuming, *arguendo,* that there was an irregularity in the pre-trial identification procedures, the witness had sufficient independent basis for his in-court identification to remove any possible taint. *United States v. Wade,* 388 U.S. 219 (1967). Woodsmall was able to get a full front view of defendant when defendant initially climbed into the car and had a side view of him for the course of the ride which lasted about five minutes. *Wright v. State,* 259 Ind. 197, 285 N.E.2d 650 (1972). The Indiana Supreme Court has defined the rule regarding in-court identification in the case of *Cooper v. State,* —Ind.—, 359 N.E.2d 532 (1977):

> "This Court, however, has adopted the 'independent basis' test when dealing with an in-court identification which is potentially tainted by an unconstitutionally suggestive pre-trial procedure. *Carmon v. State,* (1975) Ind., 325 N.E.2d 193; *Viceroy v. State,* (1974), 262 Ind. 376, 315 N.E.2d 715. Rather than to rely upon the witness' subjective memory, which appears to be the source of the problem rather than the solution, the independent basis test considers only the objective circumstances of each case. These consist of the witness' actual opportunity to observe the accused and such facts as would indicate whether or not the witness could have identified the suspect without the influence of

the suggestive procedure. *Viceroy v. State, supra; Fraiser v. State* (1974), 262 Ind. 59, 312 N.E.2d 77."

Woodsmall had ample opportunity to observe defendant for a full five minutes in broad daylight, and the defendant's features were not concealed by a mask. Petitioner has no basis for claiming that the identification was tainted by a suggestive photographic identification.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to review the decision of the Indiana Supreme Court should be denied.

Respectfully submitted,

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